PD-0561-20
COURT OF CRIMINAL APPEALS
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No. PD-0561-20

In the

COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
11/17/2020
DEANA WILLIAMSON, CLERK

FOR THE STATE OF TEXAS

THE STATE OF TEXAS, Petitioner

v.

JACOB MATTHEW JOHNSON, Respondent

RESPONDENT'S BRIEF

FROM THE COURT OF APPEALS
FOR THE FOURTEENTH JUDICIAL DISTRICT OF TEXAS
AT HOUSTON IN CAUSE NO. 14-18-00361-CR

Dominic J. Merino
Attorney for Respondent
SBN: 00797069
2600 South Shore Blvd., Ste. 300
League City, Texas 77573
Phone: (281) 668-9130
d.merinolaw@gmail.com

PARTIES TO THE CASE

Pursuant to Texas Rule of Appellate Procedure 38.1, a complete list of the names of all interested parties is provided below so the members of this Honorable Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of this case.

*The parties to the trial court's judgment are the State of Texas and Respondent, Jacob Matthew Johnson.

*The case was tried before the Honorable Jeri Lee Mills, Presiding Judge, Brazoria County Court at Law No. One (1) and Probate Court.

*Counsel for Respondent at trial and on appeal to the 14th Court of Appeals and before this Court is Dominic J. Merino, 2600 South Shore Blvd., Ste. 300 League City, Texas 77573.

*Counsel for the State at the time of trial was Brazoria County Criminal District Attorney, Jeri Yenne (retired 9/30/2020), and is now current Brazoria County Criminal District Attorney, Thomas Selleck, and Assistant Criminal District Attorney's David Jordan Rodgers and Liliana Castillo Martinez, 111 E. Locust St., Rm. 408A Angleton, Texas 77515.

*Counsel for the State on appeal was Brazoria County Assistant Criminal District Attorney Trey D. Picard, 111 E. Locust St., Rm. 408A Angleton, Texas 77515.

*Counsel for the State before this Court is Stacy Soule, State Prosecuting Attorney and John R. Messinger, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

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STATEMENT REGARDING ORAL ARGUMENT

Petitioner did not request oral argument, nor did Respondent, and the Court denied oral argument in any event.

No. PD-0561-20

In the

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FOR THE STATE OF TEXAS

THE STATE OF TEXAS, Petitioner

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JACOB MATTHEW JOHNSON, Respondent

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

This is a direct appeal from a judgment (C.R. @ 57) convicting Respondent for the offense of Possession of Marijuana, less than two (2) ounces. Respondent was charged by information with possession of marijuana, less than two ounces under TEX. HEALTH AND SAFETY CODE sec. 481.121 on September 16, 2016. (C.R. @ 5). On May 12, 2017, trial counsel for Respondent filed a Motion to Suppress. (C.R. @ 9-11). On June 15, 2017, the trial judge held a hearing on the Motion to Suppress. On June 21, 2017, the Court denied the Motion to Suppress. (C.R. @ 14). The two issues decided by the Court pursuant to the Motion to Suppress being whether

or not an investigative detention occurred; and, if so, whether any such detention was reasonable. (I RR @ 9). On June 22, 2017 counsel at trial for Respondent requested Findings of Fact and Conclusions of Law (C.R. @18), which were entered by the Court on August 2, 2017 (C.R. @ 30).

Following the ruling on the Motion to Suppress, Respondent – while preserving the issue of error on the Motion to Suppress – plead guilty to the Court, and was sentenced to three days' confinement with credit for three days, a five hundred dollar($500.00) fine, and court costs, along with a one hundred and eighty (180) -day driver's license suspension. (I RR (Bench Trial) @ 11).

Findings of Fact and Conclusions of Law were requested by Jacob Johnson. The trial court issued Findings of Fact and Conclusions of Law.

A timely Notice of Appeal was filed, and the case was heard on appeal by a panel of the Court of Appeals, 14th District, Houston, Texas. On May 28, 2020 the 14th Court of Appeals reversed the judgment of the trial court. Johnson v. State, 602 S.W. 3d 50, (Tex. App.-Houston [14th Dist.] 2020, *pet. Granted*), concluding as follows:

"When Officer Cox activated his emergency overhead lights and left his patrol car to make contact with Appellant's vehicle, an investigative detention occurred, and no reasonable suspicion supported that detention." *See id.,* @ 64.

The State filed a Petition for Discretionary Review in the Court of Criminal Appeals on July 3, 2020. The Court of Court of Criminal Appeals granted the State's Petition for Discretionary Review on September 16, 2020. On September 18, 2020

undersigned counsel entered his appearance for Respondent in this cause. On October 16, 2020, the attorney for the state filed their "State's Brief on the Merits" and Respondent filed this Reply Brief on November 16, 2020.

ISSUES PRESENTED

Respondents First Point of Error:

Did the Court of Appeals err in finding that the interaction between law enforcement and Respondent was a seizure?

Respondents Second Point of Error:

Did the Appellate Court err in finding that the seizure of Respondent was not supported by reasonable suspicion to justify it?

SUMMARY OF THE ARGUMENT

Issue one:

Because "[a] Court must step into the shoes of the defendant and determine from a common, objective perspective whether the defendant would have felt free to leave" State v. Garcia-Cantu, 253 S.W. 3d 236, 242 (Tex. Crim. App. 2008), Respondent asserts that- under the totality of the circumstances - based on the numerous acts undertaken by Officer Cox to show and assert his authority in this case and Officer Cox's exclusive focus on Respondent and his vehicle, the interaction between Respondent and Officer Cox was not a consensual encounter; but a seizure under the 4th amendment, and under the appropriate standard of review the undisputed facts of the case support the intermediate appellate courts' overturning of the trial judges' legal conclusion to the contrary.

Issue two:

All the facts set forth in the record focus on the surroundings and time and place, not on any suspicious conduct specific to, nor based on any act of, Respondent or his passenger. No facts in this case support the *individualized* suspicion of criminal activity necessary to support a legal conclusion that reasonable suspicion existed. Klare v. State, 76 S.W. 3d 68, 75; (Tex. App.-Hou. [14th Dist.] 2002, *pet. ref'd); citing* U.S. v. Cortez, 449 U.S. 411, 418 (1981). Despite where they were and what time it was, or what may have transpired in the parking lot in the past, the record is devoid of any specific thing done by Appellant or his passenger that would have led the detaining officer to believe

that either occupant of the vehicle was engaged in, or about to be engaged in, criminal activity prior to performing the seizure in this case; thus, reasonable suspicion did not exist, and under the appropriate standard of review the undisputed facts of the case support the intermediate appellate courts' overturning of the trial judges' legal conclusion to the contrary.

STATEMENT OF FACTS

Sergeant Robert Cox of the Brazoria County Sheriff's Department ("detaining officer") was the only witness at the hearing on the Motion to Suppress. The state stipulated that there was "no warrant" for Appellant. (I RR @ 10). The state acknowledged that the burden of proof lay with them. (I RR @ 12). Around midnight on August 28, 2016 the detaining officer noticed what he labeled a "suspicious vehicle in a park and ride, FM 2004 and FM 523." (I RR @ 13-14). The detaining officer further testified that the park and ride has been the site of "a variety of criminal activity." (I RR @ 16). Upon further inquiry the detaining officer stated that he had answered calls at that park and ride "maybe three or four" times in the months around August, 2016. (I RR@ 17). The detaining officer observed a vehicle sitting off to the side of the lot with no other vehicles around it. (I RR @ 18). The detaining officer did not know if the vehicle was on or off and did not see any headlights or other lights on in the vehicle. (I RR @ 18). The detaining officer shined his spotlight on the vehicle and observed it was occupied by two (2) people, with movement in the vehicle. (I RR @ 18). In response to questioning by the Court, the detaining officer

testified that after observing Appellant's vehicle with two people in it he activated his overhead lights when ten (10) to fifteen (15) yards away from the vehicle (I RR @ 20), then approached the vehicle. Once on top of the vehicle, the detaining officer observed Appellant's pants to be undone and smelled the odor of marijuana. (I RR @ 22). When asked if he would have let them go had he not observed the pants undone and smelled marijuana the detaining officer said, "I would have identified them and released them." (I RR @ 22). The detaining officer was in a marked vehicle when he entered the park and ride. (I RR @ 23).

I. FIRST POINT OF ERROR

The Court of Appeals did not err in finding that the interaction between law enforcement and Respondent was a seizure.

A. Standard of Review

An appellate court reviewing a trial court's ruling on a motion to suppress applies an abuse-of-discretion standard, overturning the lower court only where the ruling of the trial court falls outside the zone of reasonable disagreement. Martinez v. State, 348 S.W. 3d 919, 922 (Tex. Crim. App. 2011).

"A trial court's denial of a motion to suppress is reviewed under a bifurcated standard of review." Valtierra v. State, 310 S.W. 442, 447-448 (Tex. Crim. App. 2010). The appellate court is to afford almost complete deference to the trial court's determination of historical facts, especially if those facts are based on an assessment of credibility and demeanor. Brodnex v. State, 485 S.W. 3d 432, 436 (Tex. Crim. App. 2016); Crain v. State 315 S.W. 3d 43, 48 (Tex. Crim. App. 2010); but, the appellate court is to conduct a *de novo* review of mixed questions of law and fact that do not turn on an assessment of credibility or demeanor. Brodnex, 485 S.W. 3d, at 436. "When a trial court makes explicit fact findings, the appellate court determines whether the evidence (viewed in the light most favorable to the trial court's ruling) supports those fact findings." State v. Kelly 204 S.W. 3d 808, 818 (Tex. Crim. App. 2006). The trial court's ruling will be upheld under any theory of law supported by the facts of the case regardless of whether the facts are inferred by the reviewing court or

express fact findings of the trial court. Alford v. State, 400 S.W. 3d 924, 929 (Tex. Crim. App. 2013). Because conclusions of law are reviewed *de novo* either express or implied conclusions of law will be upheld under any theory of law applicable to the case. Crain 315 S.W.3d, at 48-49.

B. Burden of Production and Proof

"To suppress evidence for an alleged Fourth Amendment violation, the defendant bears the initial burden of producing evidence that rebuts the presumption of proper police conduct." Ford v. State, 158 S.W. 3d 488, 492 (Tex. Crim. App. 2005). "A defendant satisfies this burden by establishing that a search or seizure occurred without a warrant." *Id.* If a defendant makes a sufficient showing that a search or seizure occurred without a warrant the burden shifts to the state to prove that the challenged search or seizure was reasonable under the totality of the circumstances. Abney v. State of Texas, 394 S.W. 3d 542, 547 (Tex. Crim. App. 2013).

C. Applicable Law

Whether or not an interaction between law enforcement and a citizen is a seizure or a consensual encounter requires an evaluation of the totality of the circumstances to determine whether or not under the facts of the case a "reasonable person would feel free to disregard the police and go about his business." Franks v. State, 241 S.W. 3d 135, 141 (Tex. App. –Austin 2007, not pet.); *quoting* Florida v. Bostick, 501 U.S. 429, 434-435, 111 S. Ct. 2382, 115 L. Ed. 690 (1991. In other words, "[a] court must step into the shoes of the defendant and determine from a

common, objective perspective whether the defendant would have felt free to leave." Garcia-Cantu, 253 S.W. 3d, at 244.

Over the years three distinct categories of interaction between police and citizens have evolved: encounters, investigative detentions, and arrests. Johnson v. State, 414 S.W. 3 184, 191 (Tex. Crim. App. 2013). The courts look to the totality of the circumstances in determining which category is appropriate based on the facts. Crain, 315 S.W.3d, at 49. An encounter is a consensual interaction between the citizen and the police, which is not considered a seizure under the Fourth Amendment. Id.

An investigative detention occurs when a person yields to a police officer's show of authority under a reasonable belief that he is not free to leave or otherwise terminate the encounter, and any such detention must be based on reasonable suspicion. Id. An arrest occurs when a police officer has probable cause to take a citizen into custody for committing a specific crime. Id.

D. ANALYSIS

In this case Sergeant Robert Cox of the Brazoria County Sheriff's Department ("detaining officer") asserted his authority prior to approaching Respondent's vehicle as follows:

1. The detaining officer was in a marked vehicle when he entered the park and ride. (I RR @ 23);
2. The detaining officer scanned the lot and shined his spotlight across Respondent's vehicle;
3. The detaining officer stopped ten (10) to fifteen (15) yards away from Respondent's vehicle (I RR @ 20);
4. The detaining officer then conducted a "suspicious vehicle check activating my overhead emergency lights." (I RR @ 25);

5. The detaining officer then approached the vehicle. (I RR @ 25);
6. Appellant's vehicle was off to the side of the lot and there were no other vehicles around it. (I RR @ 18).
7.

"The surrounding circumstances, including time and place, are taken into account, but the officer's conduct is the most important factor when deciding whether or not an interaction was consensual or a Fourth Amendment seizure." Woodard, 341 S.W. 3d at 411. Because a court must evaluate the totality of the circumstances it is error for a court to rely on one single fact. Garcia-Cantu 253 S.W. 3d at 250. Thus, the use of overhead emergency lights is not dispositive on the issue of whether a seizure or encounter occurred. However, "the use of flashing lights as a show of authority –will likely convert the event into a Fourth Amendment seizure." Garcia-Cantu 253 S.W. 3d , at 243; quoting 4 WAYNE R. LAFAVE, SEARCH AND SEIZRE sec. 4(a), at 427 (4th edition 2004). In Garcia-Cantu the Court found that the lower courts reliance on the take-down lights as conclusive evidence that a seizure occurred to be error because the intermediate court did not evaluate the totality of the circumstances as required by Bostick and its' progeny. Garcia-Cantu 253 S.W. 3d , at 244. The Garcia-Cantu court even went so far as to include in its opinion the portion of the testimony of the arresting officer that "[i]f I had wanted them to know it was a police officer I would have turned my overhead lights on, to indicate I was detaining them." Garcia-Cantu 253 S.W. 3d , at 239. It is Appellant's contention that is exactly why the detaining officer turned on his overhead emergency lights in this case, and while not dispositive under the required totality of the circumstances test, when taken in conjunction with

the other actions taken by the officer to assert his authority made the interaction between Appellant and the officer a seizure under the Fourth Amendment.

THE MARKED UNIT

In its attempt to resuscitate the trial judge's erroneous ruling the state contends that when "[r]eviewing the proper facts in the proper light" (State's Brief @ 10) the only show of authority to seize Jacob Johnson committed by Officer Cox was his use of his overhead emergency lights (not takedown lights as in Garcia-Cantu) because nothing else he did was a show of authority. (State's Brief, @ 13). In support of his view of the facts, the attorney for the state opines that a marked unit does not mean much of anything because police drive police cars. Viewed in isolation this may be true, but when the officer driving the marked unit enters a parking lot late at night and is focused on one vehicle in that lot in particular - performing a "suspicious vehicle check" of it after spotting movement in it, and then stops 10-15 yards away from it, where the target vehicle is parked away from other vehicles, activates their overhead lights so that the officers' vehicle is lit up like it would during a traffic stop then gets out of his car and walks toward the target vehicle, with his marked unit lit up as it is during a traffic stop right behind him as he approaches, the use of the lights means a lot to the citizens in the target vehicle: it means you better stay put, or else.

NO REASON INDEPENDENT OF POLICE TO STAY PUT

The attorney for the state cites to Florida v. Bostick 501 U.S. 429 (1991) and I.N.S. v. Delgado (466 U.S. 210 210, 218) as analogous situations where no seizure

was found, despite the fact that the Defendant may not have felt free to leave. (State's Brief @ 12). This is a stretch because both cases are distinguishable on at least one critical fact: both Bostick and Delgado had other compelling reasons independent of the police to not leave: in Bostick the Defendant was a passenger on a bus that was scheduled to depart and he would "not have felt free to leave even if the police had not been present." Bostick, @ 436. In Delgado the person who alleged a seizure was at work when the agents arrived and did not feel free to leave because of "voluntary obligations to their employers." Delgado, @ 218. No preexisting reason for Respondent to stay and acquiesce exists in this case. Thus, neither case is instructive to the analysis.

FAILURE TO DRIVE OFF AS OFFICER APPROACHED

The state's attorney is also asserting (State's Brief, @ 14) that Officer Cox's stopping ten to fifteen yards away from Respondent's vehicle and not blocking in Respondent's vehicle coupled with Respondent's failure to throw his car in gear and take off as the officer walked to Respondent's car is somehow evidence of consent. Respondent submits that under these facts Respondent's failure to leave does not indicate consent; rather, it indicates he is not willing to commit a felony, risk getting shot, or risk hurting a peace officer while committing a felony and maybe getting shot.

THE APPROACH

The state minimizes the import of the approach in this case by arguing that the encounter with Respondent is just another ho-hum meeting of a police officer and a

member of the public; thus, it is not a seizure. (State's brief, @ 14) This only works if established case law is ignored because it does not consider all of the circumstances surrounding the encounter and does not "assess the coercive nature of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." Michigan v. Chesternut, 486 U.S. 567, 573 (1988). This was no chance meeting, or an officer approaching an individual on the street or in another public place. This is a case where detaining Officer Cox targeted Respondent's vehicle while in a parking lot open for business late at night for a "suspicious vehicle check", spotlighted it, drove to within ten to fifteen yards from it and it alone, activated his overhead lights, and then got out of his police car in full regalia with his overhead emergency lights activated, and walked right towards Respondent. Taken as a whole, the acts committed by Officer Cox constituted a seizure of Jacob Johnson, Respondent herein.

NON-VERBAL COMMANDS ARE STILL COMMANDS

The attorney for the state believes this is an unusual case because there is "no evidence Officer Cox asked Appellant to do anything." (State's Brief, @ 15). I agree with the state that Officer Cox did not *verbally* ask Respondent to do anything: but he did command him to stay put by using his spotlight, his overhead emergency lights, and by walking to Respondent's car and his car alone after he got out of his lit up unit to conduct a "suspicious vehicle check."

CONTEXT MATTERS

The state claims that "nothing about the time, location, or lack of other people on the scene in this case suggests a seizure rather than a consensual encounter." (State's Brief, @ 16). In this case the lack of other people on the scene attest to the targeting of Respondent's vehicle to the exclusion of any other vehicle or person. Further, it "is a reasonable inference that the objectively reasonable person would feel freer to terminate or ignore a police encounter in the middle of the day in a public place where other people are nearby than he would when parked on a deserted, dead-end street at 4:00 a.m." State v. Castleberry, 332 S.W. 3d 460, 468 (Tex. Crim. App. 2011); *quoting*, Garcia-Cantu, 253 S.W. 3d, @ 245 n. 42), which is like the situation Respondent was in during his encounter with Officer Cox.

ISOLATED POSITION OF VEHICLE SHOWS IT WAS TARGETED

Being "parked away from other vehicles" (State's brief, @ 18) means a lot in this case because that fact makes it impossible to pretend that Officer Cox was focused on anything other than Respondent after entering the lot. There is no denying that Officer Cox shined his spotlight across Respondent's vehicle, nor whose car he was stopping to examine when he stopped near Respondent's vehicle, and whose attention and obedience Officer Cox's red, flashing overhead lights were aimed at when turned on, and no doubt that Respondent was the person he was coming to speak to after keeping them him put, and then leaving his unit to conduct a "suspicious vehicle check."

HEADS STATE WINS, TAILS CITIZEN LOSES

Looking at the event from another perspective illuminates the extent of the show of authority; to wit: under these facts if the Appellant had driven away and been charged with the felony offense of Evading Arrest in a Motor Vehicle (Tex. Pen. Code Sec. 38.04) and serving as a juror you were told that his defense is that he did not know the officer was attempting to detain him when he drove off as the officer walked towards his car, what would your verdict be?

The state tries to get around this point (State's Brief, @ 20) by arguing that even though case law, common-sense, and Professor LaFave dictate that the use of overhead, red flashing lights on a police car would likely convert the event into a seizure; ("the use of flashing lights as a show of authority –will likely convert the event into a Fourth Amendment seizure." Garcia-Cantu 253 S.W. 3d, at 243; quoting 4 WAYNE R. LAFAVE, SEARCH AND SEIZRE sec. 4(a), at 427 (4th edition 2004)), it does not matter because of the qualification "as a show of authority." (State's Brief, @ 20). In other words, the analysis hinges on whatever the police officer says. Thus, as long as the officer says that he did or did not activate his red flashing lights as "a show of authority," then regardless of the circumstances it is not a seizure for purposes of the 4th amendment - citizen loses- but, if in an Evading Arrest context, then the lights do mean a seizure, as long as the police say so -state wins. Fortunately, the Courts are to "step into the shoes of the defendant and determine from a common, objective perspective whether the defendant would have felt free to leave." Garcia-

Cantu, @242; not "ask the cop."

TOTALITY OF THE CIRCUMSTANCES INDICATE A SEIZURE

The totality of the circumstances that show that Respondent was seized amounted to much more than just the emergency overhead lights being activated. The record reflects the following undisputed facts:

1. The detaining officer was in a marked vehicle when he entered the park and ride. (I RR @ 23);
2. The detaining officer shined his spotlight on the vehicle;
3. The detaining officer stopped ten (10) to fifteen (15) yards away from Appellant's vehicle (I RR @ 20);
4. The detaining officer then conducted a "suspicious vehicle check activating my overhead emergency lights." (I RR @ 25);
5. The detaining officer then approached the vehicle. (I RR @ 25);
6. Appellant's vehicle was off to the side of the lot and there were no other vehicles around it. (I RR @ 18).

It is worth noting that Officer Cox did not stop and turn on his overhead lights near any vehicle other than Respondent's which was away from any other vehicle in the lot, nor did he walk towards any other vehicle after exiting his lit up squad car 10-15 yards from Respondent's vehicle.

The facts support the conclusion that Officer Cox focused solely on Respondent's vehicle and his projection of authority was aimed at Respondent. The Appellate Courts' finding that a seizure occurred as opposed to a consensual encounter was based on much more than the overhead emergency lights' being activated. s v. State, 602 S.W. 3d 50, 58-60 (Tx. App.-Houston [14th Dist.] 2020, *pet. Granted*).

The opinion is based not only on the overhead lights, but the many other facts used to show that the detaining officer used his authority to restrain Respondent's

liberty, and therefore Respondent submits that the Appellate Court's finding that a seizure occurred is correct.

II. SECOND POINT OF ERROR

If a seizure, did the detaining officer have reasonable suspicion to justify it?

Standard of Review

A trial court's ruling on a motion to suppress is reviewed under a bifurcated standard, giving almost total deference to the trial court's determination of historical facts and reviewing the court's application of the search and seizure law de novo. Wiede v. State, 214 S.W. 3d 17, 24-25 (Tex. Crim. App. 2007).

An appellate court reviewing a trial court's ruling on a motion to suppress applies an abuse-of-discretion standard, overturning the lower court only where the ruling of the trial court falls outside the zone of reasonable disagreement. Martinez v. State, 348 S.W. 3d 919, 922 (Tex. Crim. App. 2011).

"A trial court's denial of a motion to suppress is reviewed under a bifurcated standard of review." Valtierra v. State, 310 S.W. 442, 447-448 (Tex. Crim. App. 2010). The appellate court is to afford almost complete deference to the trial court's determination of historical facts, especially if those facts are based on an assessment of credibility and demeanor. Brodnex v. State, 485 S.W. 3d 432, 436 (Tex. Crim. App. 2016); Crain v. State 315 S.W. 3d 43, 48 (Tex. Crim. App. 2010); but, the appellate court is to conduct a *de novo* review of mixed questions of law and fact that do not turn on an assessment of credibility or demeanor. Brodnex, 485 S.W. 3d, at 436. "When a trial court makes explicit fact findings, the appellate court determines whether the evidence (viewed in the light most favorable to the trial court's ruling)

supports those fact findings." State v. Kelly 204 S.W. 3d 808, 818 (Tex. Crim. App. 2006). The trial court's ruling will be upheld under any theory of law supported by the facts of the case regardless of whether the facts are inferred by the reviewing court or express fact findings of the trial court. Alford v. State, 400 S.W. 3d 924, 929 (Tex. Crim. App. 2013). Because conclusions of law are reviewed *de novo* either express or implied conclusions of law will be upheld under any theory of law applicable to the case. Crain 315 S.W.3d, at 48-49.

Burden of Production and Proof

"To suppress evidence for an alleged Fourth Amendment violation, the defendant bears the initial burden of producing evidence that rebuts the presumption of proper police conduct." Ford v. State, 158 S.W. 3d 488, 492 (Tex. Crim. App. 2005). "A defendant satisfies this burden by establishing that a search or seizure occurred without a warrant." *Id.* If a defendant makes a sufficient showing that a search or seizure occurred without a warrant the burden shifts to the state to prove that the challenged search or seizure was reasonable under the totality of the circumstances. Abney v. State of Texas, 394 S.W. 3d 542, 547 (Tex. Crim. App. 2013). In this case the state stipulated that there was "no warrant" for Appellant. (I RR @ 10). The state acknowledged that the burden of proof lay with them. (I RR @ 10-12).

Applicable Law

The Fourth Amendment to the United States Constitution prohibits unreasonable seizures by officials of the government. Crain v. State, 315 S.W. 3d 43, 52 (Tex. Crim.

App. 2010). In order to seize a person an official of the government must have "specific, articulable facts which, when combined with rational inferences from those facts, would lead the officer to conclude that a particular person actually is, has been, or soon will be engaged in criminal activity." Crain 315 S.W. 3d, at 52; Terry v. Ohio, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L, Ed. 2d 889 (1968). The standard is objective and disregards the actual subjective intent of the police officer and looks to whether there was an objectively justifiable basis for the detention. Derischsweiler v. State, 348 S.W. 3d 906, 914 (Tex. Crim. App. 2011). "The reasonableness of a temporary detention must be considered in light of the totality of the circumstances at the inception of the encounter...." Tanner v. State, 228 S.W. 3d 852, 855 (Tex. App.-Austin 2007). The information relied on by the officer must amount to more than a mere hunch or intuition. Derischsweiler, @ 916-917. To support reasonable suspicion "articulable facts must show that some activity out of the ordinary has occurred, some suggestion to connect the detainee to the unusual activity, and *some indication that the unusual activity is related to crime*. Id., @ 916; (emphasis in original) (*quoting* Meeks v. State, 653 S.W. 2d 6, 12 (Tex. Crim. App. 1983), *abrogated by* Holcomb v. State, 745 S.W. 2d 903, Tex. Crim. App. 1988)).

Analysis

The state stipulated that there was "no warrant" for Appellant. (I RR @ 10).

The only specific, articulable facts offered in support of the seizure is the testimony of the detaining officer that "[w]e have a variety of criminal activity in that

park-and-ride" and that the detaining officer had "maybe three or four" calls for service at the location in the months surrounding August, 2016. (Vol. I RR@ 16). Other than that, the record is devoid of any specific thing done by Appellant or his passenger that would have led the detaining officer to believe that either occupant of the vehicle was engaged in, or about to be engaged in, criminal activity prior to the detaining officer seizing Appellant.

"Neither time of day nor level of criminal activity in an area are suspicious in and of themselves; the two are merely factors to be considered in making a determination of reasonable suspicion." Crain 315 S.W. 3d, at 53; Klare v. State, 76 S.W. 3d 68, 73-74 (Tex. App-Hou. [14th Dist.] 2002, pet. ref'd).

The trial judge in this case states in Conclusion of Law number three that any seizure was supported by reasonable suspicion based on two factors: "[1] his presence in the park and ride, a high crime area, [2] after the park and ride's normal operating hours." (C.R @ 31). Crain prohibits the sole fact that the area was characterized as a high crime area from being the basis of reasonable suspicion. *Id.* The Court's assertion that Appellant was present after "normal operating hours" is not supported by the record because the detaining officer testified that "It's a 24-hour park-and-ride. The main use is during the daytime for people that go into plant traffic and park. But it is 24 hours open. So, we have it—people use it." (I RR @ 27).

Appellant's presence in a high-crime area cannot- as a matter of law – justify Appellant's seizure. *Id.* The other "fact" in support is not supported by the record.

Thus, under the totality of the circumstances the state failed to prove that reasonable suspicion existed to justify the seizure of Appellant, where they had the burden of proof because of the stipulation that no warrant for Appellant existed. Abney, 394 S.W. 3d, at 547.

CONCLUSION

To believe that an occupant of a vehicle in a parking lot in Angleton, Texas around midnight looking at a marked unit of the Brazoria County Sheriff's Department that has spotlighted his vehicle and has its overhead emergency lights on only 10-15 yards from his vehicle, with no other vehicles around or near him, with a uniformed officer getting out of the marked unit and walking toward his vehicle would from a "common, objective perspective ...have felt free to leave" Garcia-Cantu 253 S.W. 3d , at 244; is nothing more than a chimera.

Prior to the seizure the detaining officer did not have a single specific, articulable fact to indicate that Appellant or his passenger was engaged in, or about to be engaged in, criminal activity, therefore reasonable suspicion did not exist, thus the seizure performed in this case is unreasonable in violation of Respondent's Fourth Amendment right to be free from such encroachments on his personal liberty.

PRAYER

Wherefore, Respondent prays that this Court upholds the ruling of the 14th Court of Appeals and continue to hold that the encounter was a seizure and the seizure occurred in the absence of reasonable suspicion and uphold the ruling of the intermediate

appellate court. Additionally, Respondent prays for any and all relief to which Respondent may be entitled.

Respectfully submitted,

/s/ Dominic J. Merino
Dominic J. Merino
Counsel for Respondent
TBN: 00797069
2600 South Shore Blvd., Ste. 300
League City, Texas 77573
Phone: (281) 668-9130
Email: d.merinolaw@gmail.com

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of this Respondent's Reply Brief was served on counsel for the Petitioner via email on November 16, 2020.

/s/Dominic J. Merino
Dominic J. Merino
TBN: 00797069

CERTIFICATE OF COMPLIANCE

I do hereby certify that the total word count for this document is 5474 words excluding those parts specifically excluded in Texas Rule of Appellate Procedure 9.4(i)(1) which is less than 15,000 words allowed per Texas Rule of Appellate Procedure 9.4.

/s/ Dominic J. Merino
Dominic J. Merino
Counsel for Respondent
TBN: 00797069
2600 South Shore Blvd., Ste. 300
League City, Texas 77573
Phone: (281) 668-9130
Email: d.merinolaw@gmail.com